(6)

FILED
DEC 27 1927
CHARLES ELMORE CROPLEY
CLERK

No. 324.

In the Supreme Court of the United States

OCTOBER TERM 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

PETITIONERS' BRIEF.

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Wallace & Taylor,
Camden, Starling, Camden & Hemphill,
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INDEX TO BRIEF

Statement 1
Specifications of Error 16
Summary of Argument 17
Argument 20

STATUTES CITED.

Sec. 344, b, tit. 28, U. S. C.; Sec. 237 Judicial Code 4
Sec. 11, 8, tit. 11, U. S. C.; Sec. 2, 8, Bky. Act 1898 (re-opening estates) 32
Sec. 25, 8, tit. 11, U. S. C.; Sec. 7, 8, Bky. Act 1898 (duty of bankrupt) 34
Sec. 32, b, 1, 4, tit. 11, U. S. C; Sec. 14, b, 1, 4, Bky. Act 1898 (discharge of bankrupt) 35
Sec. 52, b, 2, tit. 11, U. S. C.; Sec. 29, b, 2 Bky. Act 1898 (offenses) 35
Sec. 75, a, 2, tit. 11 U. S. C.; Sec. 47, a, 2, Bky. Act 1898 (title of trustee) 21
Sec. 107, a, tit. 11, U. S. C.; Sec. 67, a, Bky. Act 1898 (liens) 20
Sec. 110, a, 5, 6, tit. 11, U. S. C.; Sec. 70, a, 5, 6, Bky. Act 1898 (title of trustee) 22
Sec. 110, f, tit. 11, U. S. C.; Sec. 70, f, Bky. Act 1898 (revesting of title) 34
Art. 6636 Vernon's Ann. Tex. St. Rev. 1925 (Acts of 1889, p. 103; G. L. Vol. 9, p. 1031) 10, 15, 20

CASES CITED.

Acme Harvester Co. vs. Beekman Lbr. Co., 222 U. S. 300; 32 S. Ct. 96 ..... 5, 27
Brandes vs. Barber, 13 Fed. (2d) 65 (8th Circuit) 23

Davis vs. Wakelee, 156 U. S. 680; 15 S. Ct. 555 ... 38
Danciger et al. vs. Smith, 286 S. W. 633 (Ct. Civ. App. Tex.) ... 1, 2
Danciger et al vs. Smith, 289 S. W. 679 (Sup. Ct. Tex.) ... 1, 2
Dushane vs. Beall, 161 U. S. 513; 16 S. Ct. 637 ... 43
Edelstein vs. U. S., 149 Fed. 636 (8th Circuit) ... 39
Fairbanks Steam Shovel Co. vs. Wills, 240 U. S. 642, 36 S. Ct. 466 ... 23
First National Bank of Jacksboro vs. Lasatar, 196 U. S. 115, 25 S. Ct. 206 ... 17, 24
In re Borg, 184 Fed. 640 (Dist. Ct. Minn.) ... 23
In re Cobb, 96 Fed. 821 (Dist. Ct. N. C.) ... 23
In re Duker Ave. Meat Market, 2 Fed. (2d) 699 (6th Circuit) ... 23
In re Goldman, 129 Fed. 212 (2nd Circuit) ... 33
in re Grabb, 242 Fed. 577 (Dist. Ct. N. Y.) ... 33
In re Jersey Island Packing Co., 138 Fed. 625 (9th Circuit) ... 23
In re Newton, 107 Fed. 429 (8th Circuit) ... 33
In re Patterson Lbr. Co., 247 Fed. 578 (Dist. Ct. Tenn.) ... 23
In re Schaffer, 104 Fed. 982 (Dist. Ct. N. C.) ... 33
In re Snyder, 4 Fed. (2d) 627 (9th Circuit) ... 33
Johnson vs. Collier, 222 U. S. 538; 32 S. Ct. 104 ... 29
Juden vs. Nebham, 60 S. 45 (Sup. Ct. Miss.) ... 41
Lesser vs. Gray, 236 U. S. 70; 35 S. Ct. 227 ... 5
McColgan vs. Clark, 4 Fed. (2d) 627 (9th Circuit) ... 33
Radford vs. Myers, 231 U. S. 725; 34 S. Ct. 249 ... 5
Rand vs. Iowa Central Ry. Co., 96 App. Div. 413; 89 N. Y. S. 212 ... 39

Rand vs. Sage, 94 Minn. 344; 102 N. W. 864 41
Scruby vs. Norman, 91 Mo. App. 517 42
Smith vs. Boston Elevated Ry. Co., 184 Fed. 387 (1st Circuit) 38
Standifer vs. Bond Hdw. Co., 94 S. W. 144 (Ct. Civ. App. Tex.) 21
Zavelo vs. Reeves, 227 U. S. 625; 33 S. Ct. 265 5

TEXTS CITED.

34 C. J. 923-6 "Judgments." 37

No. 224.

In the Supreme Court of the United States

OCTOBER TERM 1927.

M. O. DANCIGER AND EMERICH OIL COMPANY, A CORPORATION, PETITIONERS,

VS.

N. K. SMITH, RESPONDENT.

STATEMENT.

(a)

Reported Opinions of This Case by Lower Courts.

Danciger, et al, v. *Smith,* 286 S. W. 633 (Court of Civil Appeals, Texas.)
Danciger, et al, v. *Smith,* 289 S. W. 679 (Supreme Court of Texas.)

(b)

Judgment to be Reviewed.

The judgment to be reviewed was entered by the District Court of Dallas County, Texas, June 2, 1924, against petitioners, M. O. Danciger and Emerich Oil Company, a corporation, in favor of respondent N. K.

Smith, for $60,000.00, interest and costs (R. 70-3). Judgment was rendered on account of an alleged commission due respondent from petitioners for services rendered in obtaining an alleged purchaser for certain oil property owned by petitioners.

Petitioners duly appealed to the Court of Civil Appeals of Texas, which court affirmed the judgment May 15, 1926 (R. 354) (*Danciger et al,* v. *Smith,* 286 S. W. 633).

Petitioners then applied to the Supreme Court of Texas for a writ of error which application was denied by that court on December 1, 1926 (R. 446) (*Danciger et al,* v. *Smith,* 289 S. W. 679). Pursuant to leave of court, motion for rehearing was filed by petitioners in the Supreme Court of Texas and overruled January 19, 1927 (R. 446).

Petitioners then sought the issuance of a writ of certiorari from this court and filed their petition, brief and record for same and this case was docketed in this court as of April 15, 1927 and within the statutory three months period. The writ was granted by this court May 31, 1927 (No. 1060 *Danciger et al,* v. *Smith,* 47 S. Ct. 765 71 L. E. 871).

(c)

Specific Claims Advanced and Rulings Made in Lower Courts Relied Upon as Basis of This Court's Jurisdiction.

The answer of petitioners in the trial court among other defenses set up a plea in bar and alleged that since the filing of the suit, respondent had been ad-

judicated a voluntary bankrupt in the Dallas division of the United States District Court for the Northern District of Texas and had filed schedules of assets and liabilities therein, but had failed to schedule his alleged chose in action, claim and demand against petitioners in said suit and failed to apprise the court and the officers of said court or the trustee or referee in bankruptcy of the existence of said alleged claim against petitioners or of any claim against petitioners for any amount whatever and that on account of such facts, respondent was not the owner of the alleged claim and not entitled to prosecute said suit (R. 19-20).

The trial court denied this right, privilege and immunity thus specifically set up and claimed by petitioners by refusing petitioners' motion for a directed verdict (R. 39), although the fact of voluntary bankruptcy following the commencement of this suit and the failure of respondent to schedule this alleged claim is conceded. The Court of Civil Appeals of Texas by affirming the the judgment and the Supreme Court of Texas by refusing to issue its writ of error and by denying petitioners' motion for rehearing likewise denied this right, privilege and immunity claimed by petitioners.

The writ was issued and the judgment should be reversed because—

(a) These decisions deny a right, privilege and immunity specifically set up and claimed by petitioners under the Bankruptcy Act of the United States.

(b) These decisions involve and deny rights claimed by petitioners by reason of a judgment and proceed-

ings of a Federal Court which is an authority exercised under the United States.

(c) These decisions are in conflict with the applicable decisions of this court.

(d) The precise question has not been decided by this court.

(d)

Reference to Statutory Provisions Under Which Jurisdiction is Invoked.

Jurisdiction of this court is invoked under Section 344, b, Title 28, U. S. C.; Section 237, Judicial Code, which provides that it shall be competent for this court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been returned or passed by the highest court of a state in which a decision could be had

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

(e)

Reference to Cases Sustaining Jurisdiction.

The following decisions of this court hold that the question here involved is a Federal question and involves a right, privilege and immunity under a Federal

statute and an authority exercised under the United States.

Acme Harvester Co. v. *Beekman Lbr. Co.*, 222 U. S. 300; 32 S. Ct. 96.
Zavelo v. *Reeves*, 227 U. S. 625; 33 S. Ct. 365.
Radford v. *Myers*, 231 U. S. 725; 34 S. Ct. 249.
Lesser v. *Gray*, 236 U. S. 70; 35 S. Ct. 227.

(f)

Statement of Case Containing All That is Material to Consideration of Questions Presented.

The defense specially pleaded in petitioners' answer and presented to and considered by the trial court and the Court of Civil Appeals and the Supreme Court of Texas and which defense constitutes the basis for invoking the jurisdiction of this court is founded on the following facts—which facts are undisputed and are facts as testified to by respondent.

This suit was filed June 22, 1920 (R. 8). After this suit was filed respondent filed a voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas, Dallas Division, at Dallas, on June 17, 1921 (R. 328). Respondent in said bankruptcy proceedings filed schedules of assets and liabilities in the form as prescribed by this court. He did not list in his schedule of assets his alleged claim against petitioners and in said schedules stated *on his oath that he had no property of any kind or nature.* He further stated on his oath in said schedules that he had no personal property and *no choses in action.* On his oath in his schedule of liabilities respondent stated that his unsecured debts were $198,608.87 and his liability

on accommodation paper $25,113.03, and that *his secured debts amounted to only* $1125.00 (R. 166-7). In said schedules in answer to the question of what portion of his property had been assigned for the benefit of creditors, respondent stated on his oath *that none had been so assigned* (R. 163-4). On account of there being no assets of any kind scheduled no trustee was appointed (R. 163). Thereafter respondent filed in said bankruptcy proceedings his petition for discharge and, *on his oath, stated that he had duly surrendered all his property* and rights of property and complied with all the requirements of the Bankruptcy Act, and said District Court of the United States pursuant to said petition and representations of respondent entered judgment on September 23, 1921 discharging respondent in bankruptcy and discharging him from all his debts (R. 328).

When the foregoing facts were pleaded by petitioners in bar of respondent's suit, he filed an amended petition seeking to excuse the situation by alleging certain *absolute* assignments of the claim in suit as follows: (R. 37-8): To his attorneys one-third interest; to Dr. J. B. Cranfill one-third interest; to Mrs. A. E. Hutchinson two-thirds interest.

At the trial respondent introduced in evidence carbon copies of two purported letters, one addressed to Dr. J. B. Cranfill dated August 14, 1920, and the other addressed to Mrs. A. E. Hutchinson, dated August 15, 1920. Respondent testified he had in writing (R. 165) assigned a one-third interest to his attorneys for their services in this suit but no such assignment was pro-

duced or introduced in evidence. Neither was there any evidence of any re-assignment from Cranfill or Hutchinson of any interest to anyone. Neither Cranfill nor Hutchinson appeared in any way, either as parties or witnesses in the trial or other proceedings or the record of this case. The letter to Hutchinson is as follows (R. 325-6):

"Aug. 15/1920

Mrs. A. E. Hutchinson, Dallas, Texas:

Dear Mrs. Hutchinson: Referring to our several conversations this is to confirm our agreement arrived at relative to settlement with you covering the amounts of money advanced me, which apparently seems to have been lost in my oil ventures.

As explained to you, I have invented a new kind of wrench which I am endeavoring to get patented and I also have some claims for commissions against M. O. Danciger and Emerich Oil Company and others of Wichita Falls and also one against Y. O. McAdams of Dallas. Suit has been brought in both of these matters and, as previously explained, same have been brought in my name.

Now in consideration of what I am due you covering amounts of money advanced to me, I hereby transfer to you a *two-thirds interest in all of these matters* and agree to push to completion the patent referred to and to prosecute the two claims through the courts in my name and under this agreement to turn over to you any results received therefrom as agreed."

Yours very truly, (Signed) N. K. S.
3705 Dartmouth Ave., Dallas, Texas" (italics ours).

The letter to Cranfill is of the same tenor and effect except that it purports to assign a one-third interest in the same matters and is as follows (R. 326).

"Dallas, Texas, Aug. 14, 1920.

Dr. J. B. Cranfill, Dallas, Texas:

Dear Sir: This is to confirm my statements to you relative to certain claims I have against Y. O. McAdams and M. O. Danciger and Emerich Oil Co., which suits have been filed on in Dallas county district court, and also that I am pushing forward the patenting of the wrench as explained to you, and which together with my ventures in the oil business and the financing of Mix-Tex Oil Mills, you have advanced such large sums of money and sustained heavy losses in so doing.

At this time, as you know, I am not able to meet any of my obligations along this line, but as agreed and in consideration of the situation I hereby transfer to you a *one third interest in a*l the matters referred to and agreed to prosecute the suits in my name, and under my obligations to you. In this way I am trusting to at least partially reimburse you.

Yours very truly, (Signed) N. K. S." (italics ours).

Respondent alone testified concerning these assignments, their purpose, or the intention of the parties. He testified they were not made as absolute transfers or assignments as alleged in his amended petition. On the contrary, he testified these assignments were made *only as security*. His testimony is as follows:

"These purported assignments of the alleged date, August 14, 1920, addressed to Dr. J. B. Cranfill, was but a *security* for the indebtedness that I owed Dr. Cranfill; that was *our intention*—just a *security* for the debt I still owe him. This paper did not reduce that indebtedness but *merely secured* him as far as I could. The *same thing is true* with respect to Mrs. Hutchinson. They would be *secured* debts after those papers were executed to the extent of *this security,* whatever value it might have (R. 166)."

"I assigned Dr. Cranfill one-third of $40,000, which would be $13,000 in round numbers and two-thirds of the $40,000 to my mother-in-law, which would be $26,000 in round numbers, and which they would hold *security* for, backed by this lawsuit which I am trying, in which my commission was $60,000. That was done on the 14 and 15 of August, 1920, respectively. I have never been able to pay off that indebtedness (R. 166-7)."

"At the time I was asked under oath in the Federal Court to file my schedule of what debts against me were secured I said that there was only $1125.00 of secured claims that was due and owing anybody in this world * * * (R. 167)."

"I laid this whole matter, as well as many others matters I was interested in before the attorney who represented my bankruptcy business * * * (R. 167)."

"As to what Dr. Cranfill said to me preliminary to my execution of *this collateral,* also anything I did with Dr. Cranfill, and all of my business transactions with him were perfectly satisfactory * * * (R. 168).

"When I get through with this thing, if the jury does not give me anything I will still owe Dr. Cranfill the same amount of money and I *will still owe* my mother-in-law the *same amount* of money, and if I live I will pay them" (R. 168) (italics ours).

Neither of these assignments were acknowledged, filed or recorded and no entry made on the minute book of the court or on the court trial docket, as required by the Texas Statute in order to render the same valid and binding against creditors and third persons (Art. 6636, Vernon's Ann. Texas Stat. Rev. 1925) (Acts 1889, page 103; G. L. Vol. 9, page 1031). The statute is as follows:

> "The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court where such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowlege of such transfer or not."

It does not appear from the record what respondent's patented wrench or respondent's claim against

Y. O. McAdams, of Dallas, were worth. Both are included in the letters to Cranfill and Hutchinson, but neither are listed in respondent's bankruptcy schedules.

Respondent testified his indebtedness to Hutchinson was $25,000 and two-thirds of this $60,000 claim and judgment is $40,000 which leaves an equity of $15,000 for respondent on this assignment alone, to say nothing of the patented wrench and claim against McAdams, the values of which are not disclosed. Respondent's indebtedness to Cranfill is not clear from the record but seems to be about $35,000 (R. 165).

It will be noticed also that, in respondent's oral testimony, he says that he assigned to Cranfill one-third of $40,000 which would be $13,000 in round numbers and to Hutchinson two-thirds of $40,000 which would be $26,000 in round numbers (R. 166-7). If this be true, then an assignment of only $39,000 was made which leaves a balance of $21,000 for respondent. Even though all or part of this balance of $21,000 was reserved for the benefit of respondent's attorneys, it was likewise for the benefit of respondent.

It conclusively appears from respondent's own testimony, that he was not seeking to recover merely for the benefit of his two alleged assignees and this was not merely an action by the assignees in the name of the assignor. It conclusively appears that the purported assignments are invalid as to third persons and especially as against the bankruptcy

court and a trustee in bankruptcy, because the Texas Statute as to the acknowledgement, recording and filing of assignments was not complied with. It conclusively appears that the assignments were made not as transfers or sales of interests in the claim in suit, *but merely as security.* It conclusively appears that the failure to schedule was deliberate and intentional.

Both the court of civil appeals and the supreme court decided the case on the theory that respondent still had an equity in these claims, notwithstanding the purported assignments. Both courts finally rest their decisions on the theory that, as no trustee was appointed, therefore, title did not pass out of respondent, the bankrupt and, therefore, he had a right to maintain the suit either for his own benefit or the benefit of a favored creditor, or both, but both courts concede that if a trustee had been appointed and the same facts otherwise existed, respondent could not maintain the action.

Referring to this defense the court of civil appeals in its opinion says in part (R. 361-3; 286 S. W. 633 l. c. 636):

> "In considering this matter, we do not find it necessary to determine the question as to whether there remained in appellee an equitable interest in the claim after he made the assignments hereinbefore mentioned for, *even admitting that such an interest did remain,* still his being adjudicated a bankrupt could not affect the *validity of the assignments nor the right of the assignees to have the suit prosecuted in his name.*

"The suit did not abate by reason of the bankruptcy proceedings nor could a trustee, if one had been appointed, have intervened except with the approval and on the order of the bankruptcy court. Subdivision C of Section 11 Bankrupt Act makes provision for such a situation as follows: 'a trustee may, with the approval of the court, be permitted to prosecute, as trustee, any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.'

"It follows, therefore, that, if the suit had been prosecuted by appellee in his own right, *as no trustee was appointed,* presumably for good and sufficient reasons appearing to the court, appellants would not thereby have been discharged.

"In *no event,* under our view of the law, *would failure* of appellee *to schedule* the claim in the bankruptcy proceedings, discharge the liability of appellants or *constitute a bar to this action.* If there remained in appellee any equitable interest in the claim, *it passed constructively into the custody of the bankruptcy court* when he was adjudicated a bankrupt, to be administered for the benefit of his creditors. That court, for reasons which we have no right to scrutinize, *failed to appoint a trustee,* and later closed the estate and discharged appellee" (italics ours).

Concerning this matter the supreme court in its opinion says, in part (R. 447-52; 289 S. W. 679):

"It appears that the defendant in error was adjudicated a bankrupt, but, since he listed no assets, *no trustee in bankruptcy was ever appointed* and, of course, no claim was made by a trustee to the assets evidenced by the claim recovered on in this proceeding * * *.

"Plainly stated the insistence is that when the defendant in error filed his petition in bank-

ruptcy and was adjudicated a bankrupt, all title to the choses in action upon which this suit is brought passed out of him and that, in so far as the present litigation is concerned, he was civilly dead * * *.

"Whatever may have been the previous holdings of authoritative courts, it is certain now that the bankrupt is no longer considered as civilly dead during the time elapsing during the period of the adjudication in bankruptcy and the appointment of a trustee. On the contrary, the courts now hold that the *title to the property remains in the bankrupt and subject to his control until a trustee is appointed and has qualified.* He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property and his rights in this respect are *only divested by the appointment of a trustee* * * *.

"Upon these authorities it is plain enough that the opinion of the court of civil appeals holding that the *defendant in error in this suit could maintain the action is correct.* Nor is the opinion in conflict with that of *Perkins* v. *Alexander,* 209 S. W. 789 (Texas). The court of civil appeals in that case held that, where the plaintiff *failed to schedule a note* in his bankruptcy proceedings and inferentially *concealed from the trustee* he could not, after having been adjudicated a bankrupt, *maintain suit on the note and foreclose a mortgage securing it without showing that the trustee had not elected to claim the note or refuse to do so.* In that case a trustee in bankruptcy had been appointed and *this is a material and distinguishing difference between it and the case at bar*" (italics ours).

Neither of the courts comment on the undisputed and uncontradicted facts shown by record that nei-

ther of the alleged assignments were acknowledged, filed or recorded, as required by Article 6636, Vernon's Annotated Texas Statutes, Rev. 1925 and that, therefore, under the bankruptcy law, the assignments for whatever purpose made were entirely void as against the bankruptcy court, trustee and creditors.

Petitioners contend that these decisions are fundamentally contrary to the Bankruptcy Act of the United States and the applicable decisions of this court.

SPECIFICATIONS OF ERROR.

I.

The error consists in holding that a bankrupt who, under oath, represents to a bankruptcy court, that he has no property of any kind, and thereby causes a trustee not to be appointed, and upon whose representation that he has turned over and revealed all his property and conformed to all the requirements of law obtains a judgment of a Federal Court in bankruptcy discharging him from all his debts, can then proceed to prosecute a suit in his own name either for his own benefit or the benefit of a favored creditor, or both, and recover judgment based on a chose in action which was in existence before and during the bankruptcy proceedings, and which, according to the bankrupt's own statement, was assigned as security and which assignments were, for noncompliance with the state law, void in bankruptcy as against the trustee and creditors and which property it was his duty, under the Bankruptcy Act, to schedule and which failure to so schedule and reveal was done under cover of false oaths in the bankruptcy proceedings and which false oaths constituted a crime under the Bankruptcy Act.

SUMMARY OF ARGUMENT.

(a)

The Texas statute required an assignment of a chose in action to be in writing, acknowledged and filed in order to be valid as against persons subsequently dealing with reference to the same. This section was not complied with as to either assignment. Consequently these assignments were, under the provisions of the Bankruptcy Act, void as against a trustee in bankruptcy and this chose in action was as much a part of respondent's estate in bankruptcy as though these assignments never existed.

(b)

Respondent's testimony was that these assignments were given only as security and there is no other evidence as to the purpose and intention of these assignments. Therefore these assignments, being given as security, they did not, even if valid as against a trustee in bankruptcy or creditors, prevent this chose in action from being and constituting a part of respondent's estate in bankruptcy.

(c)

Under the decision of this court in *First National Bank of Jacksboro* v. *Lasatar,* 196 U. S. 115, respondent cannot by withholding knowledge of the existence of this chose in action from the bankruptcy court and his creditors and thus causing no trustee to be appointed now

assert title to this concealed asset either for himself or the benefit of a favored creditor or both. The Texas courts in deciding this case took the view that, inasmuch as no trustee was appointed, that, therefore, no trustee existed to receive title and that respondent, under the Bankruptcy Act, would not be divested of title until the appointment of a trustee. Petitioners contend that this is error and that this court's decision in *Bank* v. *Lasatar, supra,* is based on no such narrow ground, but upon the broader and more fundamental principle that a bankrupt cannot be permitted, either for his own benefit or a favored creditor, to thus profit by his own fraud, concealment, false oaths and crime and that, to permit him to do so, would be a fraud on the bankruptcy court and in contravention of the purpose and intention of the Bankruptcy Act.

(d, e)

The filing of a petition in bankruptcy is a caveat and has the effect of an injunction and attachment on all property of respondent. From that moment all his property is *in custodia legis* and in the exclusive jurisdiction of the bankruptcy court. Pending the appointment of a trustee, the law holds the property to abide the decision of the court as effectively as if an attachment had issued. This being true, respondent cannot be permitted to exercise ownership and possession over the assets of the estate for the benefit of himself or a favored creditor. That he might be permitted in the interim to maintain a suit for the *protection* of the estate and all his creditors is an entirely different question.

(f, g, h)

That the intention and purpose of the Bankruptcy Act is not to permit the bankrupt to enjoy and exercise title and ownership for his own benefit or the benefit of a favored creditor after the filing of a petition is shown by other facts, viz.: The title of the trustee relates back to the date of the filing of the petition; the estate can be re-opened at any time to administer concealed assets; the only express provision in the Bankruptcy Act for the re-vesting of title in a bankrupt is by the confirmation of a composition

(i)

Upon respondent's own statement, if his alleged claim against petitioners is true, he was guilty of crimes for which he could be punished by five years imprisonment and guilty of false oaths in his bankruptcy proceedings and through fraud and misrepresentations and false oaths and the commission of crimes, invoked the jurisdiction of a Federal court and obtained its judgments and orders. Litigants are not permitted to obtain the judgments and orders of courts upon certain representations and then when it is to their convenience or profit repudiate such representations and obtain the judgments and orders of another court on a directly opposite state of facts concerning the same matter. This is a fraud which courts will not tolerate.

(j, k, l, m, n, o)

Courts of various states hold that respondent cannot recover under a state of facts such as disclosed by this record.

ARGUMENT.

(a)

Section 107, a, Title 11, U. S. C.; 67, a, Bankruptcy Act, 1898 provides:

> "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Article 6636, Vernon's Annotated Texas Statutes, Rev. 1925 (Acts 1889, page 103; G. L. Vol. 9, page 1031) provides as follows:

> "The sale of a judgment, or any part thereof, of any court of record, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed the clerk shall make a minute of said transfer on the margin of the minute book of the court where such judgment of said court is recorded; or if judgment be not rendered when transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which service he shall be entitled to a fee of 25 cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid

> and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

This Texas statute does not seem to have been construed by the courts of that state on the question here involved except in the case of *Standifer* v. *Bond Hardware Company*, 94 S. W. 144, (Court of Civil Appeals of Texas), wherein the Texas court stated that the purpose of the section is to make a rule as to notice to third parties of the assignment of causes of action. The section, however, is plain in its meaning that, in order for an assignment of a chose in action to be valid and binding against persons subsequently dealing with reference to the same, the assignment must be evidenced by a written transfer acknowledged in the manner reequired by law for the acknowledgment of deeds and filed of record on the record or trial docket in the case. The object of the statute is obviously the same as statutes requiring the recording of chattel mortgages, mortgages, deeds of trust, conditional sales contracts, etc., the noncompliance with which is universally held to make the transfer void as against third persons subsequently dealing with reference thereto. The statute declares a public policy of the State of Texas that assignments of choses in action not made, acknowledged and filed in conformity with the statute shall not be valid except as between the parties.

Section 75, a, 2, Title 11, U. S. C.; Section 47, a, 2, Bankruptcy Act 1898, as amended, 1910, provides in part:

> "and such trustees as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Section 110, a, 5, 6, Title 11, U. S. C.; Section 70, a, 5, 6, Bankruptcy Act 1898 provides:

> "The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt except insofar as it is to property which is exempt, to all * * * (5) property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property."

Since the amendment of 1910 the trustee no longer stands in the shoes of the bankrupt but, as to property in the custody of the bankruptcy court, the trustee stands in the position of a creditor holding an execution or other lien by legal or equitable proceedings levied under state law and, as to property not in the custody of the court, he stands in the position of a judgment creditor holding an execution returned unsatisfied. The trustee is vested as of the date the petition is filed with all the rights, remedies and powers of a creditor holding

a lien on the property of the bankrupt in the custody or coming into the custody of the bankruptcy court without regard to whether or not any creditor actually acquired, prior to bankruptcy, any right, claim or lien upon the property. The trustee holds these rights and stands in this position for the benefit of both subsequent and antecedent creditors.

Brandes v. *Barber*, 13 Fed. (2d) 65 (Circuit Court of Appeals, 8th Circuit).
In re Duker Avenue Meat Market, 2 Fed. (2d) 699 (Circuit Court of Appeals, 6th Circuit).
Fairbanks Steam Shovel Co. v. *Wills*, 240 U. S. 642; 36 S. Ct. 466.

(b)

Respondent testified that these assignments were made for the purpose and intended to be only as security to Cranfill and Hutchinson. His testimony was the only evidence as to the purpose and intention. His testimony, he being the plaintiff, controls as to the purpose of the assignments, even though the assignments purported to be on their face, absolute assignments.

In re Borg, 184 Fed. 640 (Dist. Ct. Minn.).

Assets assigned as security nevertheless constitute a part of the bankrupt estate and may be administered in the bankruptcy court. See:

In re Cobb, 96 Fed. 821 (District Court of North Carolina).
In re Jersey Island Packing Company, 138 Fed. 625 (Circuit Court of Appeals, 9th Circuit).
In re Patterson Lumber Company, 247 Fed. 578 (District Court of Tennessee).

Even, therefore, if it could be held, as we think it cannot be, that the assignments were valid liens on this chose in action as against the trustee and creditors, still, under the bankruptcy law this chose in action was a part of the bankrupt estate and upon the filing of the petition, came into the custody and under the jurisdiction of the bankruptcy court.

(c)

Petitioners contend that the rule laid down by this court in *First National Bank of Jacksboro* v. *Lasatar*, 196 U. S. 115, 25 S. Ct. 206, to the effect that a bankrupt who concealed assets from his trustee could not afterwards maintain an action to recover same, is based on no such narrow or technical ground as is the distinction made by the Texas courts. The facts in that case were that Lasatar borrowed money from the First National Bank of Jacksboro, Texas, and was charged usury. After this transaction he became a voluntary bankrupt and returned no assets to his trustee in bankruptcy. After his discharge in bankruptcy, he brought suit against the bank to recover twice the amount of usury as is provided under the Federal statutes. The bank pleaded the proceedings in bankruptcy as a bar to the action. The Court of Civil Appeals of Texas denied the defense and this court reversed the Texas court, saying in part as follows:

> "The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was re-transferred to J. L. Lasatar upon the termination of the bankruptcy proceed-

ings, he having returned no assets to his trustee and having failed to notify him or his creditors of this claim for usury and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. (Citing authorities.)

"But that doctrine can have no application where the trustee is ignorant of the existence of the property and has had no opportunity to make an election. *It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee knowledge of certain property can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it.* If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled and *this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.*" (Italics ours.)

Under the authority of the above case the Texas courts concede that, if a trustee had been appointed in respondent's bankruptcy proceedings, that then the plea in bar would be good, and that respondent could not have maintained the action. We think this court's opinion does not rest solely upon the narrow ground that a trustee having been appointed, the title vested in the trustee. It is perhaps easier to see why the bankrupt cannot be permitted to maintain an action with

regard to assets which he did not return to his trustee, where one was appointed, but it is no less the law that he cannot be permitted to maintain an action with respect to assets which he should have returned and which failure to return assets contributed to the failure to appoint a trustee. As we understand this court's opinion, it rests upon a broader ground, viz., that of estoppel and that a bankrupt, by representing the facts to be a certain way in the bankruptcy court cannot, after having invoked the jurisdiction of the bankruptcy court and obtained its orders and judgments based upon such representation, be permitted to repudiate and, in effect, attack the judgment and proceedings of the bankruptcy court by asserting a contrary state of facts when it is to his interest to do so. To permit him to do so would be a fraud on both courts and would permit the bankrupt to profit by his own wrong-doing and criminal acts. Having represented the facts in the bankruptcy court, the bankrupt should be forever estopped and barred to assert a contrary state of facts at any time or in any proceeding, except in a clear case of innocent mistake of fact, and no such claim, of course, is made here.

Petitioners contend that respondent, as a bankrupt, cannot go into a court of bankruptcy and represent on his oath to that court that he owns no property or choses in action whatever, including this claim, and has not assigned or transferred any property as security to any creditor and thus contribute to, if not entirely cause, a trustee not be appointed and then, after such concealment and false oaths, and after his discharge,

be deemed to be in a better position with respect to maintaining an action and recovering assets, either for himself or his favored creditors (which assets really belong under the law to his estate and all his creditors) than a bankrupt who merely conceals the existence of assets from his trustee. The effect of the distinction made by the Texas court is to put a premium on the actions of the bankrupt who not only conceals assets and makes false oaths, but who is so successful in his deception as to prevent the appointment of a trustee.

(d)

The filing of a petition in bankruptcy is a *caveat* and has the effect of an attachment and of an injunction as to all the property of the bankrupt. The proceeding is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition. This is the settled construction of this court and of all the federal courts as to the effect of the bankruptcy act. Thus in *Acme Harvester Co.* v. *Beekman Lumber Company,* 222 U. S. 300, 32 S. Ct. 96 it is said:

> "The filing of the petition is a caveat to all the world and in effect an attachment and injunction * * *. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court *is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* * * * There are many provisions of the law which show its purpose *to hold the property of the bankrupt intact from the filing of the petition,* in order that

> it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings * * *. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. *Pending proceedings, the law holds the property to abide the decision of the court* upon the question of adjudication *as effectively as if an attachment had been issued.*" (Italics ours.)

Notwithstanding no trustee was appointed, yet, upon the filing of the voluntary petition in bankruptcy by respondent, all of his assets, even though concealed, passed so far *into the custody of the bankruptcy court* for the benefit of his creditors that respondent cannot thereafter, be permitted, after having been discharged from his obligations and debts, to assert a title in such concealed assets either for his own benefit or the benefit of a favored creditor or both.

Notwithstanding no trustee was appointed respondent succeeding in trading his assets (whether concealed or revealed) for a complete discharge from his debts, just as effectively and conclusively as though a trustee had been appointed. Having obtained that benefit he must therefore be deemed to have lost the right and benefit to any asset which, under the bankruptcy act, constitutes the *quid pro quo* for his release.

Pending adjudication and before the appointment of any trustee, the bankruptcy court may and usually does take the property into its custody and control it.

This is usually accomplished through a receiver. After the filing of the petition the property is not subject to attachment, or execution, nor can a lien creditor maintain replevin therefor. The bankrupt cannot sell, transfer or convey his property while the bankruptcy proceedings are pending except subject to the possibility that the bankruptcy court can and may, on investigation, set aside the sale. A proposed sale of property by a bankrupt after the filing of a petition and before adjudication may be restrained while proceedings for an adjudication are pending.

These considerations all sustain the contention that, after the filing of a petition, the bankrupt cannot be permitted to assert any title, ownership or possession in derogation of his estate.

What is the difference in principle between suing for and recovering judgment for the benefit of himself or favored creditors and selling, mortgaging or otherwise disposing of assets after the filing of a petition? One is just as incompatible with the purpose, intention, letter and spirit of the Act as the other. After the filing of the petition all dealings with the property of the bankrupt, whether by the bankrupt or other persons is subject to being set aside by the bankruptcy court and will be set aside if not for the best interests of the estate.

(e)

The Texas Supreme Court placed particular stress on the case of *Johnson* v. *Collier*, 222 U. S. 538, 32 S. Ct. 104, wherein this court held that, in the interim, between

the date of the filing of a petition in bankruptcy and the appointment of a trustee, the bankrupt had sufficient title to maintain an action for the protection of the bankrupt estate. That case involved no questions of fraud, false oaths and concealment of property by the bankrupt, and we do not consider it a case touching the point in issue. We are quite willing to concede that a bankrupt has, under certain circumstances, sufficient title to maintain an action *to protect* the estate. Acts in derogation of the estate must however necessarily fall in a different class.

The stumbling block of the Texas court seems to be the failure to appoint a trustee. Again we say the rule which forbids the maintenance of a suit of this character by a bankrupt, under the circumstances herein detailed, does not rest upon a technical inquiry into the question of just where the title to the bankrupt estate is vested in the absence of the appointment of a trustee. While there was no trustee in which the title of the bankrupt could vest, nevertheless, under the plain intention and purpose of the Bankruptcy Act, the title of the bankrupt was *so far suspended* that he could not, after deceiving the bankruptcy court and his creditors, claim an advantage growing out of and founded on that deception and crime and in derogation of the estate.

(f)

To further show that the title of the bankrupt is considered suspended immediately upon the filing of the petition, it is only necessary to bear in mind that it is consistently held that, whenever the trustee is elected,

his *title dates back* to the date of filing of the petition. This necessarily means that from the moment of the filing of the petition some sort of *limitation* has come upon the title of the bankrupt. Whatever title the bankrupt may be held to have in the interim to enable him to bring an action *to protect* the estate, is necessarily a very qualified and limited title and right. Such title and right can be considered to exist and be held to be exercised only for the benefit of the estate, creditors, court and trustee. It is no such right or title as will enable the bankrupt to maintain an action for his personal benefit or for the benefit of a favored creditor and in fraud of creditors and court.

The case of *Clarence Corney, Receiver of Massell Realty Corp.* v. *Moses Saltzman, et al,* No. 12 decided by the Circuit Court of Appeals for the 2nd Circuit printed in full in the United States Daily of Washington, D. C. for Thursday, December 15, 1927, page 10, holds that a transfer of property made by the bankrupt within four months of the filing of the petition is not made valid by the fact that it was executed pursuant to contractual obligation to do so more than four months before the filing of the petition. The court says:

> "Section 67a of the Bankruptcy Act eliminates liens against a bankrupt's estate, which, but for want of record or other reasons, would have been valid liens as against the claims of creditors of the bankrupt. It forbids the holder of an instrument who might have had a lien, if he had recorded it before the bankruptcy, to acquire such a lien by recording it afterwards. *It gives the trustee a better title than the bankrupt possessed.*"

It follows, therefore, from the provisions of the Bankruptcy Act that, on account of the fact that these purported assignments were not acknowledged and filed in accordance with the Texas statute that, therefore, this chose in action was property belonging to the estate in bankruptcy. In the Bankruptcy Court and as against the trustee in bankruptcy and the general creditors these assignments were void and of no force and effect.

At the time this case was tried in the District Court of Texas and down to the present time, the trustee in bankruptcy, as and when appointed, has a better title to this chose in action than either of the purported assignees of the same. This respondent as plaintiff in the case below, had no title whatever either for *himself* or for his alleged *assignees* at the time judgment was recovered.

(g)

To further show that this asset does not belong to respondent and that he cannot be permitted to appropriate same for himself and favored creditors, attention is called to Section 11, 8, Title 11, U. S. C.; Section 2, 8, Bankruptcy Act, 1898, which provides that courts of bankruptcy have jurisdiction to

> "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered."

Under this provision of the Act, it is held that a bankruptcy court has jurisdiction at any time to re-

open the estate where the assets have not been fully administered and appoint another trustee or, if none has been originally appointed, to appoint a trustee. This does not in any way affect the discharge of the bankrupt. It is also held that an application to reopen the estate is not a suit within the meaning of the bankruptcy act or the provision of the bankruptcy act providing that suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate is closed. The administration of the estate and the discharge of the bankrupt are separate and distinct. A bankrupt may be discharged before the estate is fully administered and before the estate is closed or the estate may be entirely closed and all assets administered and the bankrupt not discharged. It is not necessary that a trustee ask for the reopening of the estate. Any creditor who has proved his claim can file an application to reopen the estate.

In re Newton, 107 Fed. 429 (8th Cir.).
In re Snyder, 42 Fed. (2d) 627 (9th Cir.).
McColgan v. *Clark*, 4 Fed. (2d) 627 (9th Cir.).
In re Schaffer, 104 Fed. 982 (Dist. Ct. N. C.).
In re Goldman, 129 Fed. 212 (2nd Cir.).
In re Graff, 242 Fed. 577 (Dist. Ct. N. Y.).

It, therefore, appears that this concealed asset of the bankrupt estate so far belongs to the bankruptcy court and the creditors that it can be administered in that court at any time and the estate may be reopened for that purpose.

(h)

Section 110, f, Title 11 U. S. C.; Section 70, f, Bankruptcy Act, 1898, provides:

> "Upon the confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him."

This is the only provision that can be found in the Bankrupty Act providing for the revesting of title in a bankrupt. It is the only circumstance under which the Bankruptcy Act contemplates that a bankrupt shall retain or be revested with title to any of his property which is of value. The courts have held that the trustee in bankruptcy can abandon property which he considers of no value to the estate. By expressly providing the circumstances under which title shall revest in the bankrupt Congress must be deemed to have excluded the revesting of title under any other circumstances. Respondent could not maintain this suit upon the theory that the property had been abandoned by the trustee because there was no trustee and no opportunity existed for the abandonment of the same by a trustee in bankruptcy.

(i)

Section 25, 8, Title 11, U. S. C.; Section 7, 8, Bankruptcy Act 1898, provides that among the duties of the bankrupt he shall:

> "Prepare, make oath to and file in court within ten days after adjudication, if an involuntary bankrupt, and within ten days after the filing of the petition if a voluntary bankrupt (unless in either

> case further time is granted), a schedule of his *property* showing the amount and kind of property, the location thereof, its money value in detail, *and a list of his creditors showing their residence,* if known; if unknown, that fact to be stated, the amount due each of them, the consideration thereof, the *security held by them,* if any, and a claim for such exemptions as he may be entitled to, all in triplicate, etc."

It was therefore respondent's duty to reveal to the bankruptcy court that Hutchinson and Cranfill were secured creditors and reveal to the bankruptcy court the security held by them. The fact that Cranfill and Hutchinson were alleged secured creditors did not in any way relieve respondent from disclosing such fact and the security.

Section 32, b, 1, 4, Title 11 U. S. C.; Section 14, b, 1, 4, Bankruptcy Act 1898 as amended June 25, 1910, provides for the discharging of a bankrupt unless he has

> "(1) Committed an offense punishable by imprisonment as herein provided, or * * *.
>
> (4) At any time subsequent to the first day of the twelve months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be removed, destroyed or concealed any of his property with intent to hinder, delay or defraud his creditors. * * *"

Respondent was not entitled to a discharge but nevertheless obtained same through his false oaths and representations to the court.

Section 52, b, 2, Title 11 U. S. C.; Section 29, b, 2, Bankruptcy Act, 1898, provides

> "A person shall be punished by imprisonment for a period not to exceed five years upon conviction of the offense of having knowingly and fraudulently * * * made a false oath or account in, or in relation to any proceeding in bankruptcy."

Respondent was therefore on his own statement guilty of an offense under the Bankruptcy Act and liable to imprisonment for five years for each such offense. It appears he made several false oaths in connection with his bankruptcy proceedings.

We thus see that respondent was guilty according to his own statement of one or more crimes punishable by imprisonment for a period of five years. He made false oath to the Federal Court as to his secured creditors. He made false oath to the Federal Court as to what property he owned and what property had been transferred as security. He was not entitled to a discharge, if the facts are true upon which he obtained a judgment against petitioners, and therefore made false oaths and representations to the Federal Court in obtaining a discharge in bankruptcy.

The spectacle of a litigant toying with the courts in this manner is so revolting as seems to us not to need the citation of authorities that it cannot be legally sustained. Litigants cannot be permitted to swear to one set of facts in one court and then when it is for their profit, swear to a set of facts directly contrary. To permit such practice is to work a fraud not only upon the Federal Court but is to make the Texas court an aid to the fraud of respondent. No excuse exists for the brazen actions of respondent. His statement that he acted

under advice of counsel is puerile and it is well established that the advice of counsel does not excuse crime. His representations to the Federal Court were deliberate and intentional. The books are full of cases presenting various situations where litigants are estopped by their actions in former litigation to repudiate their oaths and representations and the benefits of judgments obtained through such representations.

Respondent obtained a judgment in his favor by representing the non-existence of his now alleged claim against petitioners. The federal court by granting him a discharge found that he had conformed with all the requirements of the Bankruptcy Act and that he had turned over all of his property and revealed all of his assets and had not sworn falsely with reference to any of his proceedings in bankruptcy, which necessarily involves the finding that this alleged claim did not exist—otherwise there could have been no discharge of respondent in bankruptcy. Respondent cannot be permitted to collaterally attack the judgment and proceedings of the bankruptcy court entered in his favor. He cannot be permitted to contradict and impeach the judgment and proceedings of the federal court. The doctrine of *res adjudicata* conclusively prevents his asserting the existence of this claim for his own benefit or the benefit of a favored creditor.

In 34 C. J. 923-6 under Judgments it is said:

> "Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied

> from its final decision as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words. • • • In other words it is allowable to reason back from the judgment to the basis on which it stands, and regarding the judgment as a conclusion and finding it to be one which could have been drawn only from certain premises, the premises are equally *res adjudicata* with the conclusion itself."

The judgment of the federal court discharging respondent can only be sustained under the schedules filed by him by a finding that this claim was non-existent.

This court in *Davis* v. *Wakelee*, 156 U. S. 680, 15 S. Ct. 555, at length has laid down the doctrine that, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, because his interests have changed, assume a contrary position.

In *Smith* v. *Boston Elevated Ry. Co.*, 184 Fed. 387 (1st Circuit) it is said:

> "The sworn testimony of the party who has control of his case with power to bind himself *conclusively* by pleadings, stipulations or admissions as to facts resting upon his own knowledge is of such solemn character that, in the absence of a clear showing of mistake, inadvertency or over-sight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts. • • •
>
> "A plaintiff, we think, after having sworn to facts resting in his own observations and knowledge before one jury should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve

the conclusion that his testimony at the first trial was knowingly false."

Judgments of courts of bankruptcy, in matters over which they have jurisdiction, possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction and, unless reversed on appeal or writ of error, impute absolute verity and are not subject to collateral attack.

Edelstein v. *U. S.*, 149 Fed. 636 (8th Circuit).

(j)

In *Rand* v. *Iowa Central Ry. Co.*, 96 App. 413, 89 N. Y. S. 212, action was brought to recover for personal services and defendant interposed the defense that, prior to the commencement of the suit, plaintiff had been adjudicated a bankrupt. It was shown that plaintiff did not schedule this chose in action or any other property and, consequently, *no trustee* in bankruptcy was appointed. The court says:

"The plaintiff contends that the title and right to maintain the action remained in him until the appointment of a trustee in bankruptcy, and, since one was not appointed, his title and right have not been divested. This contention on the part of the plaintiff seems so extraordinary and fraught with consequences so disastrous to the rights of creditors, that a court should hesitate to so declare the law, unless there is no avenue of escape. At first blush it would seem that the plaintiff not only perpetrated a fraud upon the bankruptcy court, but, having by the bankruptcy proceedings lulled his creditors into acquiescence, now claims the right to recover upon this claim upon the theory that the adjudication in bankruptcy discharges him from all liability

to his creditors. It should be stated, however, that the testimony of the plaintiff in his own behalf tends to show that this claim was not fraudulently concealed, but that it was omitted in good faith by advice of counsel. However, that may be in this particular case, it is manifest that, if the court decides that the plaintiff may maintain this action, fraudulent bankruptcy proceedings will be multiplied manifold, and causes of action will be concealed with a view to being prosecuted by the bankrupt in his own right, after obtaining his discharge.

* * * * * * * *

"I think it is the fair intent and true construction of the bankruptcy act and rules, that, if no trustee be appointed, because assets are not shown, yet a trustee may and should be appointed upon the discovery of assets. It may be that the legal title to this chose in action remained in the bankrupt, but it is clear, I think, that *he holds it as a trustee, and that the equitable title passed to the creditors and the custody and control passed to the court for their benefit,* to be administered through a trustee, to whom the legal title will pass on his appointment, and that, therefore, the plaintiff is not the real party in interest and cannot maintain this action."

Notwithstanding the above case was reversed by the New York Court of Appeals (see 186 N. Y. 58), we are convinced the above reasoning and decision cannot be successfully assailed without opening up a wide road for fraud by bankrupts on the courts and their creditors. The New York Court of Appeals reversed the case on very much the same theory as the Texas courts have decided this case, viz., on a narrow consideration of whether or not legal title passed where no trustee was appointed.

(k)

In *Rand* v. *Sage*, 94 Minn. 344, 102 N. W. 864, plaintiff, after bankruptcy, sought to recover certain assets. No trustee had been appointed and these assets not disclosed and the Supreme Court of Minnesota held plaintiff could not recover, saying in part:

> "While the full legal title and control of the property does not pass to the trustee until one is appointed and qualified, yet if the creditors do not for any reason act within the time limited, the power is expressly conferred upon the court to appoint such trustee, and if necessary in the meantime to take possession of the property and exercise dominion and control over it for the benefit of the creditors through the medium of a receiver specially appointed or the marshal of the court. These powers would not have been granted if it had been the intention to deprive the court of dominion over or jurisdiction of the estate pending the time a trustee might be appointed. Title remaining in the bankrupt is inconsistent with control of the estate by the court. There must be either one thing or the other. The bankrupt retains title to his property with power to exercise dominion over it, to transfer and encumber it, or the title passes unconditionally to the court for the benefit of the creditors, until a trustee is appointed or the estate is closed. The latter is the only rational view consistent with the provisions of the Act.
>
> "Conceding that title passed, and the property of the bankrupt remained suspended or vested in the court for the benefit of the creditors, another question arises, etc."

(l)

In *Juden* v. *Nebham*, 60 S. 45, the Supreme Court of Mississippi had this identical question before it and

held plaintiff could not recover where he had gone into bankruptcy, concealed the assets and caused a trustee not to be appointed, saying in part:

> "If appellants owed appellee any amount when he filed his petition in bankruptcy, then it was appellee's duty to report and schedule that amount and surrender any benefit therefrom as a part of his estate. He cannot take advantage of any failure to do this."

(m)

The foregoing three cases are eloquent statements of the reasons why the result reached by the Texas courts must be deemed erroneous and out of line with the general intent and purpose of the law and particularly of the bankruptcy act.

In *Scruby* v. *Norman*, 91 Mo. App. 517, plaintiff sought to recover on a note and defendant set up the fact of plaintiff's bankruptcy. A trustee was appointed in that case, but the language used by the court is such that it leaves no doubt that the result would be the same without regard to whether a trustee was appointed. The court says in part:

> "Will the fact that the said debt is not enumerated or referred to anywhere in the proceeding in bankruptcy as a part of the assets of the bankrupt's estate, or that the trustee took no steps to reduce it to possession, nor to have himself substituted as plaintiff in this suit, have the effect, after his discharge, and that of the plaintiff as a bankrupt, to revest in the latter, the interest that was divested by the bankrupt proceedings? That such would be the effect is inconceivable. The record in the bankruptcy proceedings show that

> the plaintiff, at the time of the adjudication, was largely indebted. It further shows that no assets of his estate were scheduled or came into the hands of the trustee, so that his creditors were paid nothing on their claims. And can it be that his right to sue for the recovery of the debt, which existed at the time of the adjudication, but of the ownership of which he was deprived by that adjudication, may be restored by the discharge of the trustee and the bankrupt? Can it be that in a case where a bankrupt has not enumerated in his schedule or surrendered a chose in action due to him at the time of the filing of his petition in bankruptcy, or when by fraud and perjury he is enabled to withhold such chose from the administration of his estate by the trustee, that his title and interest in such chose survives in him and the bankruptcy proceeding and can be asserted by him in a judicated proceeding after his discharge in bankruptcy; or, if such title and interest does not survive the adjudication, is it *ipso facto* revived by the discharge? To answer these queries in the affirmative would be to invite the commission of the gravest fraud and perjury, which it is safe to assume was never intended by the bankrupt law."

It will be observed that the court in the above case takes the broad view that the title was divested out of the bankrupt by the adjudication. We think this is the only sound conclusion that can be reached.

(n)

This is in line with the holding of this court in *Dushane* v. *Beall*, 161 U. S. 513, 16 S. Ct. 637. In that case it is held that a bankrupt cannot, after his discharge, sue and recover on a claim *which it is not*

shown was abandoned by the assignee or trustee in bankruptcy. In that case the evidence tended to show that the assignee in bankruptcy knew nothing about the claim and the same was not, in any way, mentioned in the bankruptcy proceedings, and this court held that the bankrupt could not sue and recover in his own name for his own benefit on account of such claim, notwithstanding the assignee in bankruptcy failed, for a number of years, to prosecute the claim. In other words, before a bankrupt can invoke the aid of a court to assist him in recovering property or rights which properly belong to his estate as a bankrupt, he is *bound to show that there has been an abandonment of such property or rights by the trustee in bankruptcy, and that it is only by virtue of such abandonment that the bankrupt is deemed revested with any such right or title as will enable him to recover.*

The same rule ought to prevail in a case where no trustee was appointed, and the *bankrupt should be required to show an abandonment* of the particular property or rights before he is allowed to recover and where as here, it appears that no trustee was appointed, then no abandonment can be shown.

None of the cases hold that the custody, control and title of the bankrupt *remains* in the bankrupt until the appointment or election of the trustee, but, on the contrary, all the cases hold that the property is in the custody of court from the time of the filing of the petition, and that, when the trustee is finally elected, whether in a short time or many years, that the title

of the trustee does not date from the appointment of the trustee but dates from the time of the filing of the petition in bankruptcy. We, therefore, say that the bankrupt does not have such title, right and interest in the property belonging to the estate in the interim between the filing of the petition in bankruptcy and the appointment of the trustee as will enable the bankrupt to prosecute suit and recover judgment for assets belonging to the bankrupt estate and in derogation of that estate.

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